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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

Counsel for Petitioner.

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BRIEF FOR PETITONER.

Opinion Below.

The Circuit Court of Appeals for the Ninth Circuit wrote no opinion. The District Court for the Northern District of California entered an order (R. 66) approving the report of the United States Commissioner (R. 26-32), and also filed a certificate that there was no merit in petitioner's application for appeal *in forma pauperis* (R. 68-69).

Jurisdiction.

The order of the District Court of the United States for the Northern District of California, denying petitioner's application for a writ of *habeas corpus*, was entered on July 1, 1940 (R. 66). Petitioner's motion for leave to appeal *in forma pauperis* was filed in the District Court on August 1, 1940 (R. 66), and the order denying the appeal *in forma pauperis* was filed on August 12, 1940 (R. 68). The petition for leave to appeal *in forma pauperis* was filed in the Circuit Court of Appeals for the Ninth Circuit on August 27, 1940 (R. 73), and was denied without opinion on September 5, 1940 (R. 76). The petition for a writ of certiorari, unaccompanied by a record, was received by the Clerk of this Court on October 21, 1940,[1] and it was filed and granted on March 3, 1941 (R. 76). The jurisdiction of this Court rests upon Section 262 of the Judicial Code.[2]

Questions Presented.

1. Whether the so-called "writ of *habeas corpus*" made returnable before a United States commissioner is a valid writ.

2. Whether, if the so-called writ were valid, the proceeding before the United States Commissioner and the District Court was nonetheless invalid because of plain and prejudicial errors of law.

3. Whether the decision of the District Court may be supported on a ground not suggested by that court—that no writ need have issued because no violation of the Fifth and Sixth Amendment was charged.

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[1] Information supplied by the Clerk.

[2] The petition (p. 1) invokes jurisdiction under Section 240(a) of the Judicial Code, as amended (U. S. C., Title 28, Sec. 347(a)). It seems clear, however, that jurisdiction must rest on Section 262. See *In re 620 Church Street Corp.*, 299 U. S. 24, 26. See also Point I, *infra*.

4. Whether the admitted error in sentencing petitioner to two consecutive terms of imprisonment for the same offense can be corrected by a decision by the Court at the present time that only the ten-year sentence imposed on the first count is valid.

Constitutional and Statutory Provisions Involved.

The relevant constitutional and statutory provisions are set out in the Appendix, *infra*.

Statement of Facts.

On May 8, 1939, pursuant to leave granted (R. 9), petitioner filed an amended petition for a writ of *habeas corpus* in the United States District Court for the Northern District of California (R. 1-3). From his amended petition (hereinafter referred to as the petition) it appears that on September 24, 1936,[3] he was indicted in the United States District Court for the District of North Dakota. The indictment was in two counts, and charged robbery by force and robbery putting lives in jeopardy of a State bank insured by the Federal Deposit Insurance Corporation.[4] Petitioner was convicted under that indictment on October 13, 1936, upon a plea of guilty. He is now in prison in the United States Penitentiary at Alcatraz, California, in the custody of respondent in execution of a judgment and sentence, imposed pursuant to that conviction, of ten years' imprisonment on the first count, and fifteen years sentence on the second count, the fifteen year sentence to commence at the expiration of the sentence on the first count (R. 1-3).

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[3] The date stated in the petition (R. 1) is May 27, 1936. The correct date appears from the indictment itself (R. 5), attached to the petition as a part of "Exhibit A".

[4] Robbery of a bank insured by the Federal Deposit Insurance Corporation, defined in the Federal Reserve Act, Sec. 12(c) (8), U. S. C., Title 12, Sec. 264(c) (8), as an "insured bank", is made a Federal crime by U. S. C., Title 12, Secs. 588a and 588b.

We understand that the Government now concedes that one of the two sentences is invalid.

The petition alleges that the judgment, sentences and imprisonment are contrary to the statutes, laws and the Constitution of the United States in two respects: (a) that at the trial petitioner did not have the advice and assistance of counsel; that the trial court did not advise or inform him that he was entitled to counsel; that he did not know he was so entitled if he could not pay for counsel; and that he did not make an intelligent or competent waiver of his constitutional right "to have the assistance of counsel for his defense" (R. 1-2); and (b) that although petitioner had committed but one offense, he had been sentenced under two counts of an indictment for two terms to run consecutively, and hence had been put in double jeopardy (R. 2). Annexed to the petition were certified copies of the indictment, the order of commitment and the marshal's return thereto, and the arraignment, plea and sentence (R. 3-9).

The entire proceeding in the District Court was conducted in a way utterly at variance with the speed with which *habeas corpus* proceedings should move. On June 29, 1939, almost two months after the petition was filed, and even then apparently only after a further motion by petitioner's attorney (see R. 9), District Judge Lauderback issued an order to respondent directing him to show cause on July 10, 1939, why a writ of *habeas corpus* should not issue (R. 9-10).

On July 10, 1939, respondent filed a return to the writ (R. 10-11), which showed that he held petitioner under a commitment issued by the United States District Court for the District of North Dakota, and a transfer from the United States Penitentiary at McNeil Island, Washington, to Alcatraz, ordered by the Attorney General (R. 10-11). Attached to the return were certified copies of the same papers as were attached to the petition, plus the docket entries and the transfer order (R. 11-13). Also attached were a "Cer-

tificate" of Judge Miller of the United States District Court for the District of North Dakota, and an affidavit of Deputy United States Marshal Kennedy of the same district (R. 15-16). In substance, Judge Miller stated that he had no independent recollection of petitioner's case, but that it had always been his uniform practice to inquire of defendants charged with felonies who appeared without counsel whether they wanted counsel, and that he was positive to a moral certainty that he had so inquired of petitioner before he permitted the plea of guilty (R. 15). Deputy Marshal Kennedy's affidavit stated that on the way from Fargo, North Dakota, to McNeil Island, Washington, petitioner complained about a broken promise of a government agent with respect to his sentence; and that when Kennedy asked him why he hadn't gotten a lawyer and stood trial, petitioner stated that he had no use for an attorney, and that he had not stood trial because he feared it would not be for his best interests (R. 15-16).

Petitioner filed a traverse to the return on July 31, 1939, denying that Judge Miller had at any time inquired whether he desired to be represented by counsel, and also denying that he had made the statements attributed to him by Deputy Marshal Kennedy (R. 16-18).

Almost five months after an issue of fact had thus been joined, on December 8, 1939, Judge Welsh, of the United States District Court for the Northern District of California, witnessed what is styled in the record as a "Writ of Habeas Corpus" (R. 18), requiring respondent to

> "* * * have the body of Forrest Holiday * * * *before the United States Commissioner* for the Northern District of California, Southern Division, *at the* * * * *United States Penitentiary at Alcatraz*, California, on the 16th day of December, 1939 * * * *then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf.*" (Italics supplied.)

The hearing before the Commissioner at the Penitentiary was held three days late (R. 71) on December 19, 1939 (R. 36-65). Petitioner was the only witness. He testified, in substance, as follows:

Petitioner was arrested at Excelsior Springs, Missouri, about September 21, 1936, by two agents of the Federal Bureau of Investigation (R. 37-38, 43). After about two weeks in the jail at Kansas City, he was brought before the United States Commissioner there on three occasions, all about October 7, 1936, with a view toward removal for trial in North Dakota (R. 38, 44, 46). On two of the three occasions he was represented by an attorney, whom he paid $100, and who advised him to consent to his removal (R. 44, 46, 54). He told the attorney that he was innocent (R. 53). The attorney gave no advice as to how he should plead (R. 52, 54). Two men from the Department of Justice told him that if he did not say that he was guilty and did not waive extradition, he would get eighty years in jail and his witnesses, if he had any, would get ten years (R. 38, 45, 60-63), and that if he did sign the statement and the waiver, one of the agents would recommend that he get only ten years (R. 63). He waived extradition (R. 39, 45; 32) and at the same time, without having discussed the matter with his attorney (R. 48), signed a statement that he was "implicated in the robbery" (R. 47; 33). He did this for the purpose of avoiding an eighty-year sentence (R. 63) and on the representation of one of the Federal Bureau of Investigation agents that they would use their best efforts to obtain for him a sentence of not more than ten years (R. 64).

Then he was taken to jail in Fargo, North Dakota, and put in a ward by himself, where he was not visited by any friends or attorneys (R. 39, 47). When he was arraigned, about four days later (R. 39), the Clerk did not read the indictment (R. 40), but Judge Miller told him the nature of

the charge (R. 49). The United States attorney read the first count of the indictment; the judge asked what his plea was; and the petitioner answered "guilty" (R. 50-51). The United States attorney then read the second count; the judge asked what the plea was; petitioner hesitated, and the judge instructed that anyone who was guilty of any part of it was guilty of all (R. 51). Petitioner then pleaded guilty to the second count (R. 51). Judge Miller did not ask whether he desired to have counsel and did not advise him that he had a right to counsel (R. 40, 51, 64). The District Attorney did not advise him that he had a right to counsel (R. 40). Petitioner did not have counsel, did not have money to pay for counsel, and did not know he had a right to have counsel without money to pay for counsel (R. 40-41, 51). No one made any representations to the court for leniency on petitioner's behalf (R. 42, 64). The agent who appeared simply told the court of petitioner's prior arrests, convictions and terms of imprisonment (R. 64).

In travelling with Deputy Marshal Kennedy after the trial, petitioner did not discuss his failure to have an attorney (R. 41-42, 60-61).

Petitioner was at the date of the hearing about 36 years old, and had had education through one year of high school (R. 42, 43, 56, 58). He also had had university extension courses in mechanics (R. 56), had done considerable reading in both scientific subjects and fiction (R. 56). He had been arrested six or eight times, but had appeared in court only twice (R. 42-43, 58). Twenty years before he had been arrested in Drumright, Oklahoma on a charge of vagancy, and on that occasion he had had no funds with which to engage an attorney and had had no attorney (R. 43, 57-58). In 1925 he was arrested at Fargo, North Dakota, on a charge of larceny, was removed to Hudson, Wisconsin, where he was tried and sentenced to one to ten years, under which he served six months in the State penitentiary and three

years in the reformatory (R. 42-43, 57, 59). In the extradition proceeding in Fargo, North Dakota, at that time, and in the subsequent trial in Wisconsin he was represented by attorneys whom he paid (R. 42-43, 58). He had never been advised by anyone, and did not know until he read the decision in *Johnson* v. *Zerbst* that he was entitled to have counsel represent him in a criminal proceeding if he had no funds to employ counsel (R. 40, 43, 59).

At the close of petitioner's testimony, the hearing was continued to January 15, 1940, at the request of counsel for respondent, so that he might locate the agents and obtain their depositions (R. 65). This was never done. Instead, on January 24, 1940, counsel for respondent served notice (R. 24-25) of the taking of depositions from P. W. Lanier, United States District Attorney for the District of North Dakota, and Deputy Marshal Kennedy, on February 13, 1940, at Fargo, North Dakota. When the depositions were taken, respondent was represented by local counsel, and no appearance was made on behalf of petitioner (R. 19). District Attorney Lanier deposed to the effect that he had met petitioner on the occasion when he handled his arraignment; that he had no independent recollection of what he or Judge Miller had said to the petitioner at that time; that the invariable rule since he had been in office was for the United States Attorney or one of his assistants to explain an indictment to a defendant who had no attorney, and for the Court to advise defendant of his right to have counsel provided for him if he wanted one and had no money; and that he was sure to a moral certainty that Judge Miller had followed in petitioner's case the custom which prevailed (R. 21-22). Deputy Marshal Kennedy stated that after the trial petitioner had complained to him that he got a "raw deal"; that when asked why he didn't "get an attorney and fight the case" petitioner answered that he "couldn't afford to go to Court, that if he did they would hang him"; and

that at no time on the trip from North Dakota to McNeil's Island, Washington, did petitioner indicate that he desired an attorney (R. 23-24).

On April 30, 1940, the hearing was reopened (R. 33). The depositions of Lanier and Kennedy were offered by respondent (R. 34). Petitioner's counsel objected to several of the questions and answers but all objections were overruled (R. 34-35). Respondent then offered, and the Commissioner received as exhibits (R. 36), the petitioner's consent to removal from Kansas City (R. 32-33) and petitioner's statement that he was implicated in the robbery (R. 33).

The Commissioner filed his report with the District Court on May 23, 1940 (R. 26-32). He summarized the oral evidence (R. 27-28), considered the "certificate" of Judge Miller and the affidavit of Kennedy attached to respondent's return (R. 29) and reviewed respondent's exhibits and depositions (R. 29-30). The Commissioner then makes the following Findings of Fact (R. 30):

> "(1) Petitioner's criminal experience enabled him to understand and appreciate his rights;
>
> "(2) Petitioner voluntarily entered a plea of guilty after thoroughly understanding the charges involved;
>
> "(3) It was the uniform practice of the Court in which sentence was imposed to inquire of those charged with felonies whether or not they wished counsel;
>
> "(4) The Court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel;
>
> "(5) Petitioner voluntarily signed an admission of guilt;
>
> "(6) Petitioner competently and intelligently waived his right to the assistance of counsel."

Then, as The Law (R. 31-32) the Commissioner states various propositions, including the statement (R. 31):

"Supporting affidavits are proper evidence in *habeas corpus* proceedings."

In conclusion "predicated upon the facts and the law" the Commissioner recommended that petitioner's application be denied (R. 32).

Although this report was filed on May 23, 1940, no notice of it was given to petitioner. On June 18, 1940, petitioner filed a petition in the Circuit Court of Appeals for the Ninth Circuit seeking to mandamus Judge Welsh to decide the case (R. 70-72).[5] In that petition petitioner stated that so far as he knew, the Commissioner had not reported (R. 71). On July 1, 1940, after a hearing of which again apparently no notice was given (Pet. for Certiorari, p. 3), Judge Welsh ordered that the report of the Commissioner be "approved", and that the application for the writ is "denied", and the writ "discharged" (R. 66).[5a]

On August 1, 1940, petitioner filed in the District Court a motion for leave to appeal *in forma pauperis* (R. 66-67), setting forth the assignments of error. Judge Welsh denied the motion on August 12, 1940, on the ground that "there is no merit in the application for appeal now before the court" (R. 69). Petitioner then on August 27, 1940, applied to the Circuit Court of Appeals for the Ninth Circuit for leave to appeal *in forma pauperis* repeating the same assignments of error (R. 73-74). The application was denied without opinion on September 5, 1940 (R. 76). The petition for writ of certiorari was received by this Court on October 21, 1940,[6] and was granted on March 3, 1941 (R. 76).

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[5] The petition for leave to file a petition for a writ of mandamus was denied on July 16, 1940 (R. 73) after the decision of Judge Welsh on July 1, 1940.

[5a] We have been informed (after changes in this brief were no longer possible) that notice of the filing of the Commissioner's report was given to petitioner's attorney.

[6] See fotnote 1, *supra*.

Summary of Argument.

I.

The Court unquestionably has jurisdiction (*In re 620 Church Street Corp.*, 299 U. S. 24, 26), and it also has the power to proceed *in forma pauperis*. U. S. C., Title 28, Section 832. Moreover, even though the technical issue before the Court may be only whether the Circuit Court of Appeals for the Ninth Circuit abused its discretion in denying an appeal *in forma pauperis*, nevertheless, for many reasons, the Court should now pass on the merits of the issues raised.

II.

A. The writ issued by the district court was not a valid writ of *habeas corpus*. It did not comply with the provisions of the statute requiring the production of the petitioner "before the judge who granted the writ." R. S. Sec. 758. Nor did it comply with the requirement that the judge shall determine the facts by hearing the testimony. R. S. Sec. 761.

The noncompliance with the statute cannot be explained away on the ground that an appearance before a United States Commissioner is equivalent to an appearance before a judge. A United States Commissioner is not a judge and has not a judge's authority. *Grin* v. *Shine*, 187 U. S. 181, is thus distinguishable.

Nor can the noncompliance with the statutes be explained by the subsequent "approval" of the Commissioner's report by the judge. The provisions of the statute must be followed. Moreover, the procedure of a Commissioner's report is completely inconsistent with the policy expressed in recent decisions of this Court.

B. Rule 53 of the Rules of Civil Procedure is not applicable. Under Rule 81(a)(2) the rule is inapplicable to

habeas corpus proceedings, except upon appeal. Moreover, even if the rule were generally to be applied, the application of Rule 53 in the present case is denied by the rule itself. Rule 53(b).

C. Finally, even if the reference to a special master in *habeas corpus* proceedings is proper, the Court should not sanction the manner in which the device was utilized here. The hearing was held in prison—certainly not "judicial" procedure. The Commissioner rendered his decision on the basis of plain and unquestionable errors of law, which are demonstrably prejudicial and not cured by the district court. The district court made no findings of fact. The hearing on the "approval" of the report was apparently *ex parte*.

The decision should be reversed, with instructions to issue a proper writ of habeas corpus and hold a proper hearing. In any event, the decision should be reversed and the cause remanded, with instructions to refer the case for a determination of the facts according to law and justice.

III.

The decision may not be sustained on the ground that the writ need not have issued at all. On the facts stated, there is plainly a denial of the assistance of counsel guaranteed in the Fifth and Sixth Amendments to the Constitution. On those facts petitioner was entitled to a proper hearing in order that he might establish them.

A. The present case is directly controlled by recent decisions. *Walker* v. *Johnston*, No. 173, Present Term; *Johnson* v. *Zerbst*, 304 U. S. 458. These cases establish that the Fifth and Sixth Amendments grant more than simply the privilege of appearing by counsel. They establish that a plead of guilty is irrelevant; it is not a waiver as a matter of law, nor is it a conclusive indication of the lack of need

for the assistance of counsel. They establish the irrelevance of petitioner's prior conviction and of petitioner's representation by counsel at the preliminary hearings before his extradition.

Moreover, petitioner here makes a stronger case than was presented in these recent decisions. He was induced to plead guilty by false statements as to the possible amount of his sentence. He was promised a recommendation of leniency, but the promise was broken. He was given admittedly false legal advice by the judge. Here the judge had no independent information as to the petitioner's innocence or guilt.

The only issue which cannot be said to be settled by prior decisions is whether a request for counsel is necessary. Even on that issue, however, we believe that prior decisions are controlling. The opinion in *Johnson* v. *Zerbst* is admitted by the Government to have so indicated. The opinion and decision in *Walker* v. *Johnston* gives a similar indication. In the latter case, as here, the petitioner was ignorant of his right to have counsel if he could not pay for counsel, and could not therefore have requested counsel: a man does not request the enforcement of a right of the existence of which he is ignorant. The decision in the *Walker* case, therefore, that the pleadings stated a case for the issuance of a writ, necessarily decides that a request is not essential.

B. The prior decisions of the Court which deny the necessity of a request for counsel are fully supported by the historical background of the Sixth Amendment and by modern authorities.

IV.

The second ground urged in the petition for the writ of *habeas corpus*—that the consecutive sentences punish petitioner twice for the same offense—is admitted by the Gov-

ernment to be valid. The question of which sentence is valid—the ten-year sentence imposed on the first count or the fifteen-year sentence imposed on the second count—is properly before the Court, inasmuch as it must be determined in order to decide whether the petition is in this respect premature. That question must be resolved against the validity of the fifteen-year sentence on the second count.

ARGUMENT.

I.

This Court has, and should exercise, jurisdiction to decide the substantial issues raised by this record.

The motion for leave to appeal *in forma pauperis* was first directed by petitioner to Judge Welsh in the District Court (R. 66). That court filed a brief memorandum reviewing the merits of the case and certified that (R. 69):

> "• • • in the opinion of the undersigned, *there is no merit in the application for appeal* now before the court." (Italics supplied.)

Judge Welsh therefore denied the appeal *in forma pauperis* (R. 69). The petitioner's subsequent petition to the Circuit Court of Appeals for leave to appeal *in forma pauperis* (R. 73) was denied without opinion (R. 76). The propriety of these procedural steps is indicated in *Smith* v. *Johnston*, 109 F. (2d) 152, 154, 155 (C. C. A. 9th), and in Rules 73(a) and 81(a)(2), Rules of Civil Procedure.

Apart from the fact that the present proceeding is *in forma pauperis*, the authority of this Court to entertain the cause, notwithstanding the denial of leave to appeal by the Circuit Court of Appeals cannot be questioned. *In re*

620 Church Street Corp., 299 U. S. 24, 26.[7] Conceivably, however, the question may arise whether the statute granting the right to proceed *in forma pauperis* denies to the Circuit Court of Appeals, and presumably also to this Court, the power to entertain an application for appeal in that form. We submit that the governing statute imposes no such limitation here, and that the only question which is presented is the scope of review which should be exercised by this Court.

Unquestionably the right to proceed *in forma pauperis* is a statutory right, controlled at present by Section 832, Title 28, U. S. C.[8] That section provides, in part, as follows:

> "Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion

[7] The record does not indicate (except on the cover) when the petition for certiorari was filed. Were the jurisdiction of this Court invoked under Section 240(a) of the Judicial Code, there might, therefore, be some question as to the showing of compliance with Section 8(a) of the Act of February 13, 1925, requiring the petition to be filed in three months. Even in that case, however, the records of this Court will show the receipt of the petition for certiorari on October 21, 1940, less than three months after the entry of the order in the Circuit Court of Appeals. It seems plain, however, that the provisions of Section 8(a) do not limit the authority of this Court, pursuant to Section 262, to "give full force and effect to existing appellate authority, and of furthering justice in other kindred ways." *United States* v. *Beatty*, 232 U. S. 463, 467. Laches would seem to be the only bar, and certainly no laches is shown here.

[8] The right was conferred in the first instance by the Act of July 20, 1892 (c. 209, 27 Stat. 252), but was limited to proceedings in courts of first instance. *Bradford* v. *Southern Ry. Co.*, 195 U. S. 243. It was extended to appellate proceedings by the Act of June 25, 1910 (c. 435, 36 Stat. 866). *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43.

of the court such appeal is not taken in good faith, without being required to prepay fees or costs * * *"

Some decisions, particularly of the Circuit Court of Appeals for the Ninth Circuit, have held that when the district court refuses to allow an appeal *in forma pauperis* and certifies, in the language of this section, that the appeal "is not taken in good faith", the certificate is conclusive, and the circuit court of appeals is powerless to entertain a subsequent application. See *Smith* v. *Johnston*, 109 F. (2d) 152 (C. C. A. 9th); *Waley* v. *Johnston*, 104 F. (2d) 760 (C. C. A. 9th); *Stanley* v. *Swope*, 99 F. (2d) 308 (C. C. A. 9th); *Kelly* v. *Johnston*, 99 F. (2d) 582 (C. C. A. 9th), certiorari denied, 305 U. S. 597; *In re Wragg*, 95 F. (2d) 252 (C. C. A. 5th), certiorari denied, 305 U. S. 596. Even in those cases, however, there is a clear distinction made between a certificate of *lack of merit* in the appeal, as in the present case,[9] and a certificate in the words of Section 832, that the appeal is *"not taken in good faith"*. See *Smith* v. *Johnston, supra*, 109 F. (2d) at pp. 154-155. As the court there points out, the application for leave to proceed *in forma pauperis* should always show some merit in the application. *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45. The decision of the district court that the appeal is without merit, however, is not conclusive; it must be considered *de novo* by the

[9] There can be no question of the interpretation of the certificate here. The conclusion of Judge Welsh that there was "no merit" in the appeal was expressly based upon the reasons set forth in his order (R. 68-69) which went solely to the merits of his prior decision. The distinction between lack of *merit* and lack of *good faith* had been set forth at length almost seven months before in *Smith* v. *Johnston*, 109 F. (2d) 152 (C. C. A. 9th) and was undoubtedly well known to Judge Welsh. Although a lack of good faith could, of course, be shown by the complete frivolousness of the issue raised, the certificate did not here so state. Compare the quotation from the certificate in, *e. g.*, *Waley* v. *Johnston*, 104 F. (2d) 760 (C. C. A. 9th); *Stanley* v. *Swope*, 99 F. (2d) 308 (C. C. A. 9th); *Kelly* v. *Johnston*, 99 F. (2d) 582 (C. C. A. 9th) certiorari denied, 305 U. S. 597; *Brown* v. *Johnston*, 99 F. (2d) 760 (C. C. A. 9th), in each of which the certification was to the effect that "the grounds of appeal are so frivolous as to show that the appeal is not taken in good faith."

appellate court if application for leave to appeal is made to it. *Smith* v. *Johnston, supra.*

The only issue here, therefore, is as to the scope of review by this Court. From a strict technical viewpoint, it may be said that the sole question before the Court is whether the Circuit Court of Appeals for the Ninth Circuit abused its discretion in refusing to find merit in petitioner's application for leave to appeal *in forma pauperis*, and that, on a finding of merit in the application, the cause should be remanded to the Circuit Court of Appeals for decision. Several factors, however, should lead the Court not to take such a narrow view of the present proceeding. First, the Circuit Court of Appeals has, by its denial of the petitioner's application, already indicated that it believes petitioner's appeal is without merit. A remand for its reconsideration, therefore, is futile and unnecessary, for the decision is foreclosed and petitioner would again have to seek relief in this Court. Second, a remand to the Circuit Court of Appeals would not necessarily guarantee even a decision by that Court. The appeal *in forma pauperis* having been allowed pursuant to the mandate of this Court, a petition for a writ of certiorari before judgment pursuant to Section 240(a) of the Judicial Code, as amended, would immediately return the cause to this Court for decision on the merits. Finally (and in a petition for *habeas corpus* we believe most importantly) the decision has already been long delayed (almost exactly two years have elapsed since the petition was filed); the issues raised by the petition are substantial in the highest degree; and it is important not only for petitioner but for the Government that they be settled as soon as possible. We urge that the issues discussed below be considered fully to the end that the mandate of this Court may indicate the ultimate disposition of this case. In the discussion which follows, therefore, we treat the issues as directly raised.

II.

The so-called "Writ of Habeas Corpus" filed December 14, 1939, was not a valid writ.

On December 8, 1939, after the petition, return and traverse had been filed, District Judge Welsh witnessed a so-called "Writ of Habeas Corpus", and on December 14, 1937, this document was filed (R. 18). It commanded the Warden at Alcatraz to:

> "* * * have the body of Forrest Holiday * * * before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz, * * *; then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf."

That writ, we submit, is not and cannot be considered as a writ of *habeas corpus*, because it commands respondent to bring the body of petitioner before a United States Commissioner instead of before the judge who granted the writ.

A. The Statutes Which Prescribe the Procedure on Writs of Habeas Corpus Have Not Been Observed.

The question, being one of procedure, is governed by what the statute requires. *Walker* v. *Johnston*, No. 173, Present Term, (pamphlet p. 6). There are at least three sections of the Revised Statutes which prescribe the procedure on writs of *habeas corpus* which are violated by the procedure adopted in the present case.

First, the so-called writ does not comply with R. S. Secs. 757 and 758 (U. S. C., Title 28, Secs. 457, 458). These two sections, which may conveniently be discussed together, require that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is

returnable the true cause of the detention of such party" (Sec. 757), and that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Sec. 758).

These two sections do not, it is true, exactly parallel one another, although they are both derived from Section 1 of the Act of February 5, 1867 (c. 28, 14 Stat. 385).[10] The former seems to permit the answer to be returned before any court, justice or judge having jurisdiction. The latter makes mandatory the production of the body of the prisoner before the issuing judge. Probably, having in mind the history of the writ[11] and its classic form,[12] not merely the body but also the return must be brought before the issuing judge. The ambiguity, however, if any there be, goes only to the return of the answer. The mandate of R. S. Sec. 758 is clear: "bring the body of the party before the judge who issued the writ".

Second, and equally obvious, we submit, is the fact that the so-called writ does not comply with the mandate of R. S. Sec. 761 (U. S. C., Title 28, Sec. 461). That section requires that "The court, or justice or judge shall * * * determine the facts of the case *by hearing the testimony* * * *" (italics supplied). The fundamental importance of that guarantee was emphasized in *Johnson* v. *Zerbst*, 304 U. S.

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[10] The differences in language apparently originated in the Revised Statutes. The Act of 1867, Section 1, provides simply that the person to whom the writ is directed "shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person * * *"

[11] Holdsworth, *History of English Law*, Vol. I, pp. 202, 227; Vol. IX, pp. 118-120. It is well recognized in both England and the United States that a prisoner has a reight to apply to successive judges for writs of *habeas corpus*. *Cox* v. *Hakes* (1890), 15 A. C. 506, 514; *Salinger* v. *Loisel*, 265 U. S. 224. Cf. *Kessler* v. *Strecker*, 307 U. S. 22, 25. This practice plainly implies that a petitioner can select his own judge, and cannot be remitted to some judge he does not select.

[12] See *McNally* v. *Hill*, 293 U. S. 131, 137, n. 2; *Craig* v. *Hecht*, 263 U. S. 255, 269.

458, 466, and was reemphasized in *Walker* v. *Johnston*, *supra*.

The whole procedure was summarized in the *Walker* case. There the issue was as to the propriety of deciding issues of fact on applications for *habeas corpus* on affidavits alone. The Court stated (pamphlet at p. 6):

> "In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received * * * *Nothing less will satisfy the command of the statute* that *the judge* shall proceed '*to determine the facts of the case, by hearing the testimony* and arguments.' " (Italics supplied.)

The Government may attempt to avoid the terms of the statute in two ways. First, it may argue that the command to bring the body of petitioner before a United States Commissioner was equivalent to a command to bring the body before "the judge who granted the writ". Or, second, it may urge that the person before whom the body of petitioner is brought is irrelevant since the judge has approved the Commissioner's report. Neither response is meritorious.

1. The first response seems to have been the view of Judge Welsh. The so-called writ (R. 18), quoted above, did not refer the matter to the United States Commissioner for a report on the facts. The language of the so-called writ was in the form of the historic writ in use in the Federal courts (*McNally* v. *Hill*, 293 U. S. 131, 137, n. 2) and assumed, apparently, that the Commissioner was to dispose of the case completely. There seems to have been no opportunity afforded for filing exceptions to the Commissioner's report—indeed there seems to have been no notice whatever ac-

corded petitioner of any review of the Commissioner's findings and conclusions. Petition for Certiorari, p. 3.[12a]

Perhaps it should be stated, by way of explanation, that all of the procedural steps in the present case were taken some time prior to the decision of this Court in *Walker* v. *Johnston, supra*, on February 10, 1941. But while that may be an explanation, it is certainly not a justification. This first response to our argument flies directly in the teeth of the statute, and in the teeth of the admonition given by this Court in *Walker* v. *Johnston* that "The question is what the statute requires". We submit, in other words, that there can be no question of equivalence.

But the plain fact is that the two commands are not equivalents. A United States Commissioner is an inferior officer of the courts, appointed by them pursuant to the Constitution, Article II, Section 2. *In the matter of Hennen*, 13 Pet. 230; *Todd* v. *United States*, 158 U. S. 278, 282. He is removable at will by the appointing court. U. S. C., Title 28, Section 526. He is a ministerial officer,[13] and he has been held, for many purposes, to be not a "court".[14] He is not "a judge", and certainly he is not "the judge who granted the writ". He may, like other lawyers, accept references pursuant to an order of a court.[15] His usual functions,

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[12a] See footnote [5a], *supra*.

[13] *United States* v. *Berry*, 4 Fed. 779, 780 (D. Colo.).

[14] *Todd* v. *United States*, 158 U. S. 278, 282; *The Mary*, 233 Fed. 121 (W. D. Wash.); *In re Perkins*, 100 Fed. 950 (E. D. N. C.); *Nixon* v. *United States*, 82 Fed. 23 (E. D. Tenn.); *Ex parte Perkins*, 29 Fed. 900, 909 (C. C. D. Ind.).

[15] The statute fixing the fees for Commissioners provides, *inter alia*, that he shall be entitled "for attending to a reference in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, $3 a day." Act of May 28, 1896, c. 252, Sec. 21, 29 Stat. 184, U. S. C., Title 28, Sec. 597. This statute merely sets the fee, and obviously does not give the Commissioner a standing any higher than that which any lawyer would have. Compare the status of a referee under the Bankruptcy Act, who functions in practically all respects as a court of first instance in bankruptcy. See *Report*, Attorney General's Committee on Bankruptcy Administration (1941), pp. 3-10.

however, relate to arrests, bailments, subpoenas and recognizances.[16]

The general nature of the Commissioner's office has not been changed by the recent statute giving them jurisdiction to try, with the consent of the defendant, persons accused of petty offenses "in any place in which Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction."[17] Even under that statute, they are still not judges. But even if this statute did alter their status, it would be irrelevant here, since the statute was enacted on October 9, 1940, and no proceedings were taken in the District Court in the present case after August, 1940 (R. 66).

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[16] The relevant statutes, as they were in 1931, are summarized in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 353, n. 2:

> "The powers and duties of United States commissioners include: To arrest and imprison, or bail, for trial (18 U. S. C., § 591; see also §§ 593-597) and in certain cases to take recognizances from witnesses on preliminary hearings (28 U. S. C., § 657); to issue warrants for and examine persons charged with being fugitives from justice (18 U. S. C., § 651); to hold to security of the peace and for good behavior (28 U. S. C., § 392); to issue search warrants (18 U. S. C., §§ 611-627; 26 U. S. C., § 1195); to take bail and affidavits in civil causes (28 U. S. C., § 758); to discharge poor convicts imprisoned for non-payment of fines (18 U. S. C., § 641); to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder (8 U. S. C., §§ 49, 50); to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels (28 U. S. C., § 393); to summon master of ship to show cause why process should not issue against it for seaman's wages (46 U. S. C., § 603); to take oaths and acknowledgements. 5 U. S. C., § 92. 28 U. S. C., § 525."

See also the summary contained in *United States* v. *Allred*, 155 U. S. 591, 594-595. The only important amplification of the list in the past ten years is the statute referred to in the next footnote.

[17] Act of October 9, 1940, c. 785, 54 Stat. 1058, U. S. C., Title 18, Sec. 576 *et seq.* See also Order of January 6, 1941, United States Supreme Court, promulgating the Rules of Procedure and Practice for the Trial of Cases before Commissioners and for Taking and Hearing of Appeals to the District Courts of the United States.

Grin v. *Shine*, 187 U. S. 181, is not to the contrary. There a United States District Judge, in connection with extradition proceedings, issued a warrant of arrest directing that the fugitive, when arrested, should be brought before a United States Commissioner for further proceedings. Objection was made to this procedure, but the Court pointed out that the United States Commissioner, like a judge, had statutory power to issue such a warrant and hold such a hearing. The procedure was not objectionable, in other words, because the warrant was "made returnable before another officer, having the same power and jurisdiction to act" (187 U. S. at 188). Cf. *Blagiach* v. *Tope*, 76 F. (2d) 995 (App. D. C.). Here the case is wholly different; admittedly the United States Commissioner has no power to dismiss writs of *habeas corpus* or to remand or discharge prisoners.

Plainly, therefore, the so-called writ cannot be sustained as the equivalent of the usual writ. The command to produce petitioner's body before the United States Commissioner was no more equivalent to a command to produce his body before a judge than a command to produce it before any person duly appointed as special or standing master or auditor would have been.

2. The Government may, however, fall back to the position that even if the writ did have a defect in form, that defect was cured, as a matter of substance, by the subsequent "approval" of the report of the Commissioner by the judge.[18] We submit that this additional argument runs counter to the mandate of the statute, the practice of the courts, and the underlying policies recently and clearly enunciated by this Court.

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[18] As we have already pointed out, there was no provision made for such approval in the so-called writ (R. 18), and the hearing on the basis of which such approval was accorded was apparently done without notice to petitioner or his counsel. Pet. for Cert., p. 3.

The statutes which prescribe the procedure to be followed when a writ of *habeas corpus* is issued have already been stated and discussed. Their command is conclusive.[19] It is futile to say, in view of this particularity, that arguments on the approval of a master's or auditor's report constitute compliance with the requirement, for example, that the "judge shall * * * determine the facts of the case *by hearing the testimony*". R. S. Sec. 761. See also R. S. 757, 758, *supra*.

Under those statutes an argument *ab inconvenienti* is inadmissible. Even if it were not, however, it is not convincing. In the first place, most judges, even in busy districts, do not find it necessary to violate a plain congressional mandate. A few other district courts seem to have also been lax in ordering issues of fact arising upon the issuance of a writ of *habeas corpus* to be referred to a special master or auditor. There appear to have been similar cases in the same district court,[20] a few more in the Southern District of New York,[21] and a few more elsewhere.[22] Only *Kelly* v. *Johnston* and *Ex parte Sharp*, however, re-

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[19] The statement in *Storti* v. *Massachusetts*, 183 U. S. 138, 143, that "all the freedom of equity procedure" is prescribed by the command "to dispose of the party as law and justice require" (R. S. Sec. 761) is not to the contrary. We believe that, within the framework of the statute, the judge has discretion as to the necessary extent of the inquiry, the range of evidence and the like. But the casual remark of the Court, not directed at the present issue, cannot be taken as a decision that a reference to a master is a proper proceeding. The command to proceed "in a summary way" means only that the court should proceed with "promptness". *Storti* v. *Massachusetts*, at p. 143.

[20] *Gee Fook Sing* v. *United States*, 49 Fed. 146 (C. C. A. 9th); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.); *Kelly* v. *Johnston*, 111 F. (2d) 613 (C. C. A. 9th).

[21] *United States* ex rel. *Chin Cheung Nai* v. *Corsi*, 55 F. (2d) 360 (S. D. N. Y.), affirmed 64 F. (2d) 1022 (C. C. A. 2d); *United States* ex rel. *Fong On* v. *Day*, 39 F. (2d) 202 (S. D. N. Y.); *United States* ex rel. *Devenuto* v. *Curran*, 299 Fed. 206 (C. C. A. 2d), (see 39 F. (2d) at pp. 203-204).

[22] *Ex parte Sharp*, 33 F. Supp. 464 (D. Kans.). The practice in courts not controlled by the Federal statutes can have, of course, little bearing on the proper procedure in the Federal courts. It does appear, however,

lated to alleged unlawful imprisonment on a criminal charge, and only in *Kelly* v. *Johnston* was the practice challenged. The answer of the court was completely and demonstrably untenable.[23]

Diligent research by Government counsel may unearth a few more instances. But even if a hundred could be produced, the argument that such a procedure was essential would be unconvincing. The great majority of the Federal courts follow the command of the statute. Judge Underwood, sitting *alone* in the Northern District of Georgia, in which is located the Atlanta Penitentiary, has found it possible to follow the statute. Certainly, then, it should be possible for *four* judges in the Northern District of California to do the same.

Second, and wholly apart from the command of the statute and the ability of most Federal judges to follow it, we submit that the practice is completely inconsistent with the

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that under some circumstances the reference of fact issues to special masters has been practiced in England and in some state courts. See *Case of the Hottentot Venus,* 13 East 195 (K. B. 1810); *In re Meyer,* 146 App. Div. 626 (but see *People* ex rel. *Glendening* v. *Glendening,* 259 App. Div. 384). The decisions in Pennsylvania give no clear indication whether the courts there may decide questions of *law* without the production of the petitions, or whether they may also decide questions of fact. See *Commonwealth* v. *Curry,* 285 Pa. 289; *Commonwealth* ex rel. *O'Niel* v. *Ashe,* 337 Pa. 230; *Commonwealth* ex rel. *Zimbo* v. *Zoretskie,* 124 Pa. Super. 154.

[23] In the *Kelly* case the court states the proceedings after the filing of the petition for the writ (111 F. (2d) 614): "The court issued an order requiring appellee to show cause why the writ should not issue. Appellee filed a return, appellant filed a traverse, a hearing was had, evidence was taken, findings were made, and an order was entered denying the petition." On those facts, the court denied the applicability of R. S. Sec. 758, *supra,* stating "The section has no application to this case, for in this case no writ was granted", citing *Ex parte Yarbrough,* 110 U. S. 651, 653. Plainly, however, the court misconstrues the *Yarbrough* case. If a hearing was had, and evidence taken, it should have been *after* the writ issued. *Walker* v. *Johnston, supra.* The court appears to have confused the *issuance* of the writ with the *discharge* of the petitioner. If the petition is fair on its face, and the ultimate issue was one of fact, the statute requires that the writ issue. R. S. Secs. 755, 758. *Ng Fung Ho* v. *White,* 259 U. S. 276, 285. The same confusion is evident in the present record: the order of the District Court at the time of the approval of the Commissioner's report is entitled "Order Denying Application for Writ of Habeas Corpus" (R. 66).

policy laid down in prior decisions of this Court.[24] Here the issue at stake is the right of personal liberty. Had there been no dispute of *fact*, there would be no need for petitioner to appear in court. The legal questions can be settled in his absence. *Ex parte Yarbrough*, 110 U. S. 651; *Murdock* v. *Pollock*, 229 Fed. 392 (C. C. A. 8th). He need not be accorded the privilege of arguing his own case on appeal. *Dunlap* v. *Swope*, 103 F. (2d) 19 (C. C. A. 9th). But those were not the situations here. In the present case a man was matching his word against the word of others. He was in prison; they were not. Certainly the only hope he had of convincing the judge that he was to be believed was his demeanor on the witness stand—his willingness to testify, his attitude on cross-examination, his sincerity, and all of the other imponderables which have led courts from ancient times to accord extra weight to the judgment of the judge who heard and saw the witnesses.[25]

Fundamentally, there is little difference in the procedure here adopted and the procedure, in the same court, condemned in *Walker* v. *Johnston*, of trial on affidavits. In each case the petitioner is matching document against document. In each case the essence of a judicial inquiry is absent.[26] *Johnson* v. *Zerbst*, 304 U. S. 458, 466.

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[24] Compare also the policy against references to masters contained in Rule 53(b) of the Rules of Civil Procedure, which makes a showing of an "exceptional condition" a prerequisite to a reference in even a non-jury case. See Point II B, *infra*.

[25] Particularly is it true that petitioner will not be accorded a "judicial inquiry"—a decision by the *judges*—if, as the Government will no doubt urge, Rule 53 of the Rules of Civil Procedure is applicable. See Point II B, *infra*. Under Rule 53(e) (2) the report of the "master" must be accepted "unless clearly erroneous". Under that Rule the report of the master is plainly more than a finding of fact; his report must be accepted even though the judge might have reached a contrary conclusion. In all but the unusual case it is the decisive determination.

[26] Compare the condemnation by the Circuit Court of Appeals for the Sixth Circuit of the similar practice of deciding issues of fact on a writ of *habeas corpus* by reviewing the record in the deportation proceeding. *Chin Hoy* v. *United States*, 293 Fed. 750 (C. C. A. 6th).

B. Rule 53 of the Rules of Civil Procedure is Inapplicable.

The Government may urge that, notwithstanding any prior practices, Rule 53 of the Rules of Civil Procedure now applies, and authorizes the appointment of a "master" as defined in Rule 53(a).[27] We submit, first, that Rule 53 has no application to *habeas corpus* proceedings, and second, that even if Rule 53 were applicable, it can give no support to the procedure in the instant case because the requirements of Rule 53(b) have not been met.

1. Rule 81(a)(2) of the Rules of Civil Procedure provides that in *habeas corpus* proceedings appeals are governed by the Rules

> "* * * but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: * * *"

Under that provision there are thus two qualifications, each of which must be met before Rule 53 may be applied here: (1) there must be no governing statutes; (2) there must previously have been conformity with law or equity.

Here, neither condition can be met. The specific provisions of R. S. Secs. 757, 758 and 761, discussed in Point II A, *supra*, are "statutes of the United States" in which "the practice in such proceedings is * * * set forth". And, as we have already pointed out, those statutes are completely inconsistent with the provisions of Rule 53. Moreover, apart from various aberrations in the Ninth and

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[27] The definition of "master" in Rule 53(a) makes no specific reference to a United States Commissioner. We may assume, however, that the form of the so-called writ (R. 18) can be ignored, and that it can be treated as a reference of the issue of fact to a "special master" described as the United States Commissioner. See Point II A, *supra*.

Tenth Circuits, compare *Walker* v. *Johnston, supra,* the practice in *habeas corpus* proceedings has generally been governed by statutes which set out in detail the appropriate procedure. R. S. Secs. 751-762; U. S. C., Title 28, Secs. 451-466. Practice has not, in other words, "conformed to the practice in actions at law or suits in equity." [28]

2. Even if Rule 82(a)(2) does not dispose of the Government's contention, we submit that the contention still must fail because Rule 53 itself has not been complied with, and consequently cannot justify the reference to the United States Commissioner in the present case.

Rule 53(b) prescribes the limitations on the use of masters under Rule 53. After the general statement that masters shall be the "exception", the paragraph provides:

> "In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made *only upon a showing that some exceptional condition requires it.*" (Italics supplied.)

Habeas corpus proceedings are, of course, not tried by a jury. R. S. Sec. 761; *In re Neagle,* 135 U. S. 1, 75. Hence, the Rule provides that a reference shall be made "only upon a *showing* that some *exceptional condition* requires it." The background of the Rule indicates clearly that this phrase was intended to have a definite effect in limiting the abdication by the judiciary of its functions. Compare *Ex parte Peterson,* 253 U. S. 300; *Los Angeles Brush*

[28] Rule 81(a) (2) may refer to *habeas corpus* proceedings in their entirety, or to any single phase of such proceeding. The result here is not affected in any case. If the matter is confined to the substance of Rule 53, the first condition is not met because Rule 53 conflicts with R. S. Secs. 757, 758 and 761, and the second condition is not met because the few cases cited above show no basis for asserting that *habeas corpus* proceedings have conformed either to the equity practice of special masters, or to the law practice of auditors. *Ex parte Peterson,* 253 U. S. 300.

Manufacturing Corp. v. *James*, 272 U. S. 701; *McCullough* v. *Cosgrave*, 309 U. S. 634.

Here there is no "showing" [29] in the record of any "exceptional conditions" which warranted the extraordinary procedure adopted in this case. Nor, *dehors* the record, are there facts which can supply the omission. The presence of Alcatraz Penitentiary in the district, which might be suggested as an "exceptional condition" is made irrelevant by the ability of a single judge to handle the *habeas corpus* proceedings originating from the Atlanta Penitentiary.

C. In Any Event, The Procedure Here Was Improper.

Finally, we urge that if, for any reason, the Government should prevail on this issue, and succeed in establishing the propriety of a reference to a special master in *habeas corpus* proceedings, nevertheless this Court should not sanction the manner in which that device was here utilized.

First, the hearing before the United States Commissioner [30] was held in the "Administrative Building of the United States Penitentiary at Alcatraz" (R. 18). No "judicial" or even semi-judicial hearing can be held in such an atmosphere. We speak of imponderables, and, of course, cannot demonstrate prejudice. Nevertheless we believe a prisoner seeking his freedom is entitled to the opportunity to testify outside and away from the influence of his prison and warden.

[29] The obvious import of the word "showing" is that only in the most exceptional circumstances should the reference be made other than at the request of one of the parties, accompanied by valid reasons. See Moore, *Federal Practice*, Vol. III, Sec. 53.03.

[30] There may be some question as to the propriety of the use of a United States Commissioner as a special master. As we have shown above, he is essentially a committing magistrate, and as such is not apt to be favorably disposed to any attempt, however meritorious, by a prisoner to achieve his discharge.

Second, the Commissioner has plainly rendered his report and made his findings of fact and recommendations on the basis of several erroneous conceptions.

(a) His statement of the legal principles which he applied (R. 31) show that he believed that "Supporting affidavits are proper evidence in *habeas corpus* proceedings." Unquestionably, that was error. *Walker* v. *Johnston supra*.[31] Here the error was particularly vital, since the "Certificate" of Judge Miller (R. 15) which the Commissioner quoted at length (R. 29) and relied on under his erroneous view of the law, was peculiarly important because it was the statement of the sentencing judge. Other persons, the United States Attorney and the Deputy Marshal, might be expected to lack, in some degree, the judge's impartiality. Had the "Certificate" been excluded, the Commissioner might well have reached a contrary conclusion.

(b) Actually, the reliance on the "Certificate" was an even more flagrant error. It will be noted that the "Certificate" is not sworn to, or verified in any way. Apparently the assumption is that merely by stating that he "certifies" a fact, a judge can give a simple, unsworn statement a standing as evidence. This, we submit, is erroneous. A "certificate" which is sworn to would be entitled to be treated as an affidavit (though even then there could be no warrant for trying to give it a higher level of probative value by calling it a "certificate" rather than an "affi-

[31] In the *Walker* case, the Court stated of the affidavits filed with the return to the rule (as these were here) that they "only serve to make the issues which must be resolved by evidence taken in the usual way. *They can have no other office.* The witnesses who made them must be subjected to examination *ore tenus* or by deposition as are all other witnesses . . ." (Italics supplied).

davit"). A "certificate", not verified, is no evidence whatever.[32]

This double error of the United States Commissioner was not cured by the District Court at the hearing on the report (R. 66). No reference is made to the law which the Commissioner had applied, but since the practice in the Ninth Circuit at that time (July 1, 1940) was to consider affidavits—indeed, to consider only affidavits—see *Walker* v. *Johnston*, it can fairly be assumed that the error of the Commissioner was not corrected, and was perpetuated in the conclusion of the trial court. If the judge made an independent evaluation of the facts, he, too, might have reached another conclusion had the "Certificate" been excluded.[33]

Third, and directly related to the second point, is the failure of the judge to make any findings of fact, to which petitioner is clearly entitled. *Moore* v. *Dempsey*, 261 U. S. 86, 92; *Johnson* v. *Zerbst*, 304 U. S. 458. Compare *White* v. *Johnston*, No. 697, Present Term, in which the decision was reversed and the cause remanded to the District Court of the United States for the Northern District of California upon a confession of error by the Solicitor General, due to an absence of findings of fact. The practice of the

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[32] There are many instances in which certificates may be properly made by a District Judge, and in such circumstances there is no need that the certificate be verified. Compare the certificate authorized by Section 832, Title 28, U. S. C. (Appendix, *infra*) with respect to applications to appeal *in forma pauperis* (Cf. R. 68-69). We have been unable to find any statute, however, which authorizes a judge, acting in the capacity of a witness, to "certify" facts.

[33] Of course, it is no answer to assert that this error is immaterial because, on a remand, a deposition from Judge Miller may be obtained to the same effect as the "certificate". It is precisely because the deposition is different, and may reveal other facts, that this Court condemned affidavits in the *Walker* case. Moreover, the deposition would be under oath.

District Court in the present case is tantamount to no findings at all. The statement in the Order (R. 66) that the Commissioner's report was "approved" does not indicate whether the court adopted all of the so-called "Findings of Fact" (R. 30) (most of which are not findings of fact, in any sense, but mere conclusions) or whether he merely "approved" the Commissioner's "Recommendation" (R. 32) that the "application be denied." The similarity of the error in terminology (or perhaps in substance, see footnote 23, *supra*) between the "Recommendation", just quoted, and the Order of the court (R. 66) that the "application * * * be and the same is hereby denied" indicates strongly that the judge did not himself "approve" anything but the ultimate conclusion.

Fourth, the procedure in the district court was cast throughout in such a form as to deny petitioner the right to be heard on the approval of the report of the Commissioner. As we have already pointed out (Point II A, *supra*) the order of reference (R. 18)—the so-called "writ of *habeas corpus*"—seemed to contemplate that the Commissioner would take final action. Certainly it set no time for the report to the court. The Order (R. 66) does not recite that notice was accorded to petitioner or his attorney, and the Petition for Certiorari categorically denies that any such notice was given (p. 3). Certainly there was no notice accorded petitioner of the filing of the Commissioner's report (R. 71) and no opportunity, therefore, for filing exceptions.[33a] While this opportunity is not, perhaps, essential to due process, *Morgan* v. *United States*, 298 U. S. 468, 478, it is certainly preferred practice, and much more apt to result in ultimate justice. *Morgan* v. *United States, supra; Morgan* v. *United States*, 304 U. S. 1, 19-20. The whole matter was handled in such a confused manner as sub-

[33a] See footnote [5a], *supra*.

stantially to deny to petitioner fundamental rights to which he is entitled.

It may be urged by the Government that the errors mentioned above may not now be raised, because exceptions were not preserved. The Court has indicated, however, in *Walker* v. *Johnston, supra,* in which the same situation prevailed, that in cases such as this it will notice plain errors, even though not assigned. See also *Mahler* v. *Eby,* 264 U. S. 32, 45; *Kessler* v. *Strecker,* 307 U. S. 22, 34. Moreover, it is essential to orderly administration of justice that the procedure of the courts in the Ninth and Tenth Circuits be reviewed, and if necessary, corrected. Cf. *Walker* v. *Johnston, supra; White* v. *Johnston, supra.*

We submit, therefore, that the Court should remand the case with instructions to hold a judicial hearing before the judge on the issues of fact raised by the petition, the response and the traverse. Even if a hearing before a master be held proper, however, we submit that the case should be remanded for a proper determination of the facts according to law.

III.

The decision below may not be sustained on the ground that no writ should have issued.

The Government may urge, as it did in *Walker* v. *Johnston, supra,* that irrespective of the impropriety of the proceedings in the district court, the decision below should be affirmed on a wholly different ground, *viz.* that the writ of *habeas corpus* should never have issued at all. If it does so urge, we submit that the contention is without merit.

The salient facts have already been stated, but it may

be well to summarize them briefly here.[34] Petitioner was indicted for a serious crime—robbing a bank. At his trial in North Dakota, he did not have counsel. He was, at that time, ignorant of the fact that he was entitled to have counsel appointed for him if he could not afford counsel. He was not informed of his right to counsel by the district court. He did not waive counsel.

He was induced to plead guilty by several erroneous statements made to him by officials of the Department of Justice. They told him, falsely, that the maximum sentence which he might receive if he stood trial and were convicted would be 80 years. They told him, falsely, that they would recommend a sentence of ten years if he pleaded guilty. They told him, falsely, that if he stood trial and attempted to bring in witnesses that the witnesses would each receive a ten-year sentence.

He was taken to a different state after these representations had been made, and kept in a prison ward, isolated, for four days. When he came into court he heard the indictment for the first time, when it was read by the prosecuting attorney. He was induced to plead guilty to *two* counts of an indictment, which the Government now admits stated but one offense, by an erroneous statement by the judge, in the nature of legal advice on the proper construction of the indictment.

We submit that these facts state a case of denial of the assistance of counsel guaranteed in the Fifth and Sixth Amendments to the Constitution.

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[34] None of the essential facts, but much of the detail, is found in petitioner's testimony under oath before the Commissioner. Although these facts were not made in the petition and traverse, they were made under oath, and should, for present purposes, be regarded as an amendment elaborating the petition. Particularly is this so since the Government is seeking to sustain the decision on a ground different than that adopted by the district court. Any other course would simply compel the filing of a new petition with the facts fully elaborated. We submit that there has already been enough delay.

A. The Decisions of This Court Are Controlling in Petitioner's Favor.

This Court has recently decided several cases which state the scope of the "assistance of counsel" clause of the Constitution. *Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Avery* v. *Alabama,* 308 U. S. 444; *Frame* v. *Hudspeth,* 309 U. S. 632; *Walker* v. *Johnston, supra.* We submit that those decisions, particularly in *Johnson* v. *Zerbst* and *Walker* v. *Johnston,* are directly controlling here.

In *Johnson* v. *Zerbst,* the petitioner, an enlisted man in the United States Marine Corps, was arrested with another marine, charged with feloniously uttering, passing and possessing counterfeit Federal Reserve notes. They were represented by counsel at preliminary hearings before a United States Commissioner. Two months later, they were indicted. Two days thereafter they were arraigned and pleaded not guilty. They stated then that they had no lawyer and, in response to an inquiry of the court, stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of counsel. The lower courts denied relief in a *habeas corpus* proceeding, but on review this Court held that the petitioner was entitled to be discharged if on remand the lower court should find that petitioner had not competently waived his right to counsel. The Court, quoting from *Powell* v. *Alabama,* 287 U. S. 45, 69, stated that even an intelligent layman has little knowledge of law, and continued:

> "If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or

otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

In *Walker* v. *Johnston, supra,* the petitioner was an escaped life term convict. He was charged with bank robbery, with an accomplice, while he was at large. He was returned to the penitentiary in New Mexico where he was serving a life term, and was brought from there to Texas on April 25, when he learned that he was charged with bank robbery. Between April 25 and April 28 he talked to the United States Attorney and his assistant, who urged him to plead guilty. He asked for a continuance so that he might communicate with relatives and try to raise money for an attorney, and he asked to see his co-defendant or his attorney. The United States Attorney refused both requests, and told him that if he pleaded not guilty he would get double the sentence that would be imposed if he pleaded guilty. His co-defendant was convicted. He did not know he was entitled to counsel unless he had money, and he was not told of this right. He denied, but only on the ground that he had no knowledge sufficient to form a belief, that he wrote a letter to the United States Attorney after sentence had been imposd in which he expressed satisfaction with the result. Again, in this case, the lower courts denied relief on *habeas corpus.* Again, this Court reversed the decisions below, and held that if petitioner could establish his allegations by proof, no opportunity to do so having been afforded him by the court below, he was entitled to his discharge.

These cases, and particularly *Walker* v. *Johnston,* have definitely established several propostions which have heretofore been controverted by the Government.

1. The Fifth and Sixth Amendments are not to be limited, as some judges have indicated, to a bare right to have coun-

sel in court. See *Saylor* v. *Sanford*, 99 F. (2d) 605, 607 (C. C. A. 5th) (Sibley, J., concurring) certiorari denied 306 U. S. 630. We are not sure from a reading of the brief for the Government in the *Walker* case whether or not the extended discussion there of this position (pp. 32-35) was an attempt to advocate its adoption by this Court. Perhaps it was not, but in any event the decision in the *Walker* case effectively disposes of it.

2. It is irrelevant that petitioner here pleaded guilty. Such was the case in *Walker* v. *Johnston*. See also *Frame* v. *Hudspeth, supra*. Under the *Walker* decision, therefore, it is no longer open to the Government to urge that the plea of guilty was, "as a matter of law", a waiver of the right to the assistance of counsel (Government's Brief, No. 173, pp. 43-44). Nor is it open to the Government to urge, as it did very strongly in the *Walker* case (Br. pp. 36-38), that a plea of guilty may be taken to indicate conclusively the lack of need for the assistance of counsel. Both of these contentions were rejected by the *Walker* decision.[35]

3. It is irrelevant that petitioner had been in court before and had been convicted of a crime. Such was the case in *Walker* v. *Johnston, supra*, in which petitioner was then serving a sentence for another offense. Moreover, the Commissioner in the present case to the contrary notwithstanding, the petitioner's former convictions did *not* enable him to understand and appreciate his rights. He had, on each occasion before, been able to pay for counsel. There is nothing in such experience which would lead him to believe that he could have counsel even if he could not pay. Cf.

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[35] The only possible basis on which it might be argued that the decision in *Walker* v. *Johnston* did not decide those issues is that the decision went *entirely* upon the ground of entrapment. Cf. *Mooney* v. *Holohan*, 294 U. S. 103. The extended statement of the facts covering the right to counsel (*Walker* v. *Johnston*, Pamphlet, p. 7) makes this unlikely. Moreover, if that be the ground, that ground is present in a much more aggravated form in the present case. See *infra*.

United States ex rel. *Nortner* v. *Hiatt*, 33 F. Supp. 545, 546 (M. D. Pa.).[36]

4. It is irrelevant that petitioner had had counsel at the preliminary hearings before the United States Commissioner at Kansas City. Such was the case in *Johnson* v. *Zerbst*, *supra*.

Those contentions, formerly urged by the Government can now be eliminated from consideration. Moreover, there are additional factors, not present in the *Walker* v. *Johnston* and *Johnson* v. *Zerbst* cases, which make the Government's position here even weaker than in those cases.

1. Here petitioner was induced to plead guilty by false statements by officers of the Government. In *Walker* v. *Johnston*, as the Government pointed out in its brief (p. 40), the statements by the United States Attorney were not false. He simply stated that a prisoner will receive a more favorable sentence if he pleads guilty—"one of the facts of life which it is not to the disadvantage of a defendant to know". The same certainly cannot be said for the statements made to petitioner here, and which induced his guilty plea.

2. In the present case, the petitioner had been assured that he would have a recommendation from officers of the Department of Justice that his sentence should be ten years. Instead, he received what is, in effect, a twenty-five year sentence, no recommendation at all having been made in his behalf. In *Walker* v. *Johnston*, the sentence conformed precisely to the petitioner's expectations and he probably expressed himself as completely satisfied with it.

3. The prejudice to petitioner is even more strikingly

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[36] The petitioner's prior convictions would appear to go, in any event, only to the truth of his allegation of ignorance of his rights. Of course, petitioner can not secure his discharge until he proves the facts, but that question can have nothing to do with the present issue—whether a writ should have issued.

shown in the false legal advice given by the judge in interpreting the indictment, which resulted in petitioner being given two sentences, to run consecutively, for the same offense. The Government now concedes that at least one is invalid—that the sentence, in other words, is grossly excessive. In *Walker* v. *Johnston*, the indictment was admittedly valid and proper, as was the sentence.

4. In *Walker* v. *Johnston*, the sentencing judge, through the medium of the trial of the petitioner's co-defendant, became convinced of the petitioner's guilt, and the minutes of the sentence so recited (Record, No. 173, p. 11). Here the minutes (R. 8-9) contain no such declaration, and the judge had no such opportunity to determine, apart from the guilty plea, petitioner's guilt or innocence.

With the single exception of the matter about to be discussed, therefore, we submit that the present case is directly controlled by, and, indeed, is *a fortiori* of, the recent decision of the Court. The sole exception is based on the fact that there is no allegation here that petitioner affirmatively requested that counsel be assigned to him. We submit that the argument of the Government is unsound, and that in that respect, too, the present case is controlled by prior decisions of this Court. Moreover, even if prior decisions are not controlling, we submit that the Government's argument, that a request or apparent need is necessary, should be rejected.

The opinion in *Johnson* v. *Zerbst* gives overwhelming evidence that this Court does not believe that a request for counsel is vital. The Court there states (p. 464): "The Sixth Amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." Again, the Court states (p. 465): "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court,

in which the accused—whose life or liberty is at stake—is without counsel." Again (p. 468): "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction * * *." And, lest there be doubt as to the use of the term "Waiver", the Court points out (p. 464) that "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege", and that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."

These statements can have but one meaning—that an accused is entitled to be informed of his right to counsel, or that, stated differently, an accused does not forfeit his right to the assistance of counsel simply because he does not know that it exists. See also *Powell* v. *Alabama*, 287 U. S. 45, 71.

Indeed, in its brief in *Walker* v. *Johnston* the Government conceded (p. 36) that the Court had indicated in *Johnson* v. *Zerbst* that a defendant did not forfeit his right to the assistance of counsel simply through ignorance of that right. In effect, the Government requested a reconsideration of that decision. The effect of the opinion in *Walker* v. *Johnston* is to indicate that the position of the Court has not changed since 1938, and that *Johnson* v. *Zerbst* still states the position of the Court.

The Government may urge that the question was not reconsidered in *Walker* v. *Johnston*, because the opinion was concerned in large part with a procedural issue. Quite plainly, that is not the case. In *Walker* v. *Johnston* the Court accepted as an element in the petitioner's case that he was ignorant of his right to the assistance of counsel if he was unable to employ counsel. See Pamphlet, p. 7. The same situation is present here. Under those circumstances the petitioner in *Walker* v. *Johnston* could not have *re-*

quested counsel. A man cannot request the enforcement of a right which he does not know exists. Necessarily, the holding in *Walker* v. *Johnston* that if the petitioner there could establish his allegations he would be entitled to his discharge is a holding that a *request* is not an essential part of a petitioner's case.[37]

The Government may urge, however, that there was a "request" in the *Walker* case, to which the Court adverted in its opinion. Pamphlet, p. 7. As we have already stated, there could be no request, in the sense in which the Government now urges, because the petitioner in *Walker* v. *Johnston* was admittedly in ignorance of his right, and could not request the enforcement of what he did not know existed. Giving to the case its strongest possible interpretation,[38] the *Walker* case differs from the present only to the extent that there is a difference between a man who, not knowing he could have counsel even though unable to pay for counsel, says, in the presence of a Government official, "I wish I could afford a lawyer", and another man, also ignorant of his rights, who only *thinks* such thoughts, or does not say them when anyone is listening. Certainly the Court will not make a constitutional right depend on his chance outward expression of what, for the man who is not aware of his rights, can be only a wishful thought.

The Government may say, however, that there is a distinction between the man who makes a wish out loud, and the man who does not, because the former has indicated his

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[37] The reaffirmance of *Johnson* v. *Zerbst* is also indicated by the citation of that case as amplifying the definition of "waiver". The Government, as we have already pointed out, concedes that if the *Johnson* v. *Zerbst* definition of waiver be accepted, there can be no waiver unless the defendant is aware of his rights.

[38] The Government urged (Br. No. 173, p. 39) that the request—being for his co-defendant *or* his co-defendant's counsel—was equally susceptible of being considered as a request for an opportunity to discuss the effort of the United States Attorney to induce him to testify for the Government, and therefore could not be considered as a request for counsel at all.

need for counsel, which should therefore be offered to him. Whether a distinction so fundamentally intangible can be supported on that ground need not be decided here. Petitioner here was plainly in need of counsel. He was induced to plead guilty by false statements. He was given erroneous legal advice by the sentencing judge. He was sentenced on two counts, at least one of which was invalid, the sentences to run consecutively.

Petitioner's situation, in other words, was substantially worse than that of the petitioner in the *Walker* case. If the request of petitioner there to talk to his co-defendant or his attorney indicated the need of counsel, that factor is matched here by the several factors enumerated above.[39]

Indeed, for these same reasons, we submit that even on the Government's own statement of the limits of the constitutional right—that it is available only to the men who request counsel or who are in apparent need of counsel—the decision here should be against the Government's contention that the writ need not have issued. The needs of petitioner were apparent.

B. The Government's Position is Contrary to Both the Historical Background of the Sixth Amendment and to the Modern Authorities.

We submit, therefore, that the recent decisions of this Court have established that a request or apparent need for counsel is not a prerequisite to the invocation of the constitutional guarantee of the assistance of counsel. In other words, we submit that the constitutional guarantee entitles a defendant in a criminal prosecution to be informed

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[39] It is no answer to say that the United States Attorney and the judge in North Dakota were unaware of the prejudice. The United States Attorney certainly should have inquired of the circumstances under which petitioner signed the statement in Missouri, and should have brought the facts to the attention of the judge. The judge himself was aware of the advice which he gratuitously accorded.

by the court that he is entitled to counsel selected by himself, or, if he is indigent, to counsel selected and assigned to him by the court.

These recent authorities are fully supported by the historical background of the Sixth Amendment. The detail of that history has recently been set forth fully and lucidly by distinguished counsel in the Brief for Petitioner in *Walker* v. *Johnston*, No. 173, pp. 20-30.[40] As is there shown, the discussion in State conventions of the Bill of Rights which were to be added to the Constitution immediately after its adoption dealt to a large extent with criminal procedure. Particularly in the Pennsylvania convention, and to a lesser extent in the Virginia convention,[41] it is apparent that the framers of the Bill of Rights did not intend to follow the English common-law rule—that a prisoner was not entitled to counsel except upon a point of law—which had been criticized by the editions of Blackstone then current in the colonies.[42] See *Powell* v. *Alabama*, 287 U. S. 45, 60, *et seq.* We cannot, therefore, use the English common law as a guide to the interpretation of the language of the Sixth Amendment.

There are, however, some guides. There were certainly, in the first Congress, which drafted the Bill of Rights,

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[40] We have summarized below only that portion of the historical materials and the modern authorities set out in the *Walker* brief which bear upon the necessity for a request. The abundant proof there set forth that an accused has, under the Sixth Amendment, a right to counsel at the time of the arraignment, is not set out, for the reason that we regard that issue as concluded by the *Walker* decision. See *supra*.

[41] See also the New York and Rhode Island Bills of Rights in *Documents Illustrative of the Formation of the Union of the American States* (1927), pp. 1036, 1053.

[42] Blackstone, *Commentaries*, Book IV, p. 355: "But it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule, which * * * seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law."

echoes of the State Conventions. Again, there were many persons who were undoubtedly profoundly influenced by the contemporary French ideas, just as American ideas were largely influencing many Frenchmen.[43] And, as set out in detail in the *Walker* v. *Johnston* brief (pp. 25-26) several instructions given by the constituencies in France to the delegates to the Etats-Généraux contained provisions such as "Let counsel be assigned to the accused in all cases and from the beginning of the examination."[44] Again, we know that the phrase "shall enjoy the right * * * to have the Assistance of Counsel for his defense" was given deliberate and particular consideration by Congress. The phrase was inserted in the original draft of the House of Representatives,[45] stricken by the Senate,[46] and finally, after the House had insisted on the phrase,[47] acquiesced in by the Senate.[48] All of these facts make it highly probable that the Congress intended that an accused should have counsel—selected by him, or, if he was indigent, offered to him and assigned by the court. It used words which would carry out that intention. The phrase "assistance of counsel" would normally mean "the help afforded by counsel".[49] And the phrase "enjoy the right" would normally mean that the accused would actually possess, use or experience the right.[50]

Modern authorities, too, support our contention that the

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[43] See Georg Jellinek, *The Declarations of the Rights of Man and of Citizens* (tr. Max Farrand, 1901), p. 18.

[44] Esmein, A., *A History of Continental Criminal Procedure* (tr. John Simpson, 1913), p. 398.

[45] 1 Annals of Congress 435, 756, 767.

[46] 1 Senate Journal 77, 1 Annals of Congress 77. The Senate sent the plan of amendments back to the House due to "a dislike with respect to vicinage". Letter, Madison to Edmund Pendleton, September 14, 1789. *Writings of James Madison* (1865), Vol. I, p. 491, 492.

[47] 1 Annals of Congress 913; 1 House Journal 121; 1 Senate Journal 87.

[48] 1 Senate Journal 88.

[49] Oxford English Dictionary, Vol. I, p. 511, under "Assistance", meaning III. Meaning I apparently became obsolete in the 17th Century.

[50] *Id.*, Vol. III, p. 188, under "Enjoy", meaning III.

Constitution is violated when a person is arraigned on a serious criminal charge without being offered the assistance of counsel. The rule is so widely adopted that it "reflects if it does not establish the right to have counsel appointed, at least in cases like the present." *Powell* v. *Alabama*, 287 U. S. 45, 73. The rule is stated in the American Law Institute *Code of Criminal Procedure*, Official Draft, March 16, 1931,[51] and is buttressed there by the citation of constitutional or statutory provisions in almost every State.[52] There are many other modern authorities on criminal procedure to the same effect.[53]

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[51] The Official Draft, Section 203, provides:

"Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

[52] Official Draft, pp. 630-634.

[53] National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission), *Report on Lawlessness in Law Enforcement*, Vol. IV, pp. 5, 7. See also the special Report annexed thereto at p. 263 *et seq.*, prepared by Zechariah Chafee, Jr., Walter H. Pollak and Carl S. Stern, p. 281. Cf. *Criminal Justice in Cleveland* (a survey under the direction of Roscoe Pound and Felix Frankfurter (1922), p. 311; Raymond Moley, *Our Criminal Courts* (1930), p. 67; Pendleton Howard, *Criminal Justice in England* (1931), pp. 346-349; Reginald Heber Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, 1919), pp. 111-112. See comment on *Powell* v. *Alabama*, 287 U. S. 45, in Felix Frankfurter, *Law and Politics*, "The Supreme Court Writes a Chapter on Man's Rights," p. 189. At p. 193 it is said that "Not only must there be a court free from coercion, but the accused must be *furnished* with means of presenting his defense. For this the assistance of counsel is essential. *Time for investigation* and for the production of evidence is imperative." (Italics supplied.) See also the recommendation of the *Report of the Judicial Conference*, October Session, 1940, p. 16, that provision should be made for the appointment of public defenders.

IV.

The consecutive sentences put petitioner twice in jeopardy, contrary to the Fifth Amendment.

The petition (R. 2) and the petition for certiorari (pp. 2, 13-17) raise a second, and completely independent ground upon which the petitioner should have been discharged. That ground relates to the fact that although the two counts of the indictment (R. 3-5) reiterated the same offenses, petitioner was sentenced to separate and *consecutive* sentences on each count.

The Government, we are advised, will not deny that one of the sentences is void for this reason. *Durett* v. *United States,* 107 F. (2d) 438 (C. C. A. 5th); *Hewitt* v. *United States,* 110 F. (2d) 1 (C. C. A. 8th), certiorari denied 310 U. S. 641. In all probability the Government will urge, however, that the question of which of the sentences is valid is not now material, since even the lesser sentence has several years to run. Further, it will probably urge that if the question of which sentence is valid were at issue, that the valid sentence is the longer, fifteen-year sentence on the second count. Cf. *Hewitt* v. *United States, supra.* We submit that the issue is before the Court in this proceeding, and that the valid sentence is the ten-year sentence on the first count.

The issue is raised in these proceedings by virtue of the Government's failure to admit that the ten-year sentence imposed on the first count is the valid sentence, and its contention that the fifteen-year sentence imposed on the second count is the valid sentence. If the fifteen-year sentence were the valid sentence, petitioner would now be held under an admittedly invalid ten-year sentence, since the fifteen-year sentence is expressly made by its terms to begin at a time still in the future (R. 9). Under those circumstances,

no valid order would now apply to petitioner, and the writ would not be premature.[54] *McNally* v. *Hill*, 293 U. S. 131, in which the valid sentence was the *first* sentence, corresponding to the ten-year sentence here, is plainly distinguishable.

Of necessity, therefore, the Court must decide which of the sentences is valid in order to determine whether or not the writ is premature. Such a proceeding is not unusual; frequently the Court is forced to pass on the merits of a case in order to determine whether or not it has jurisdiction. Compare *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S. 82.

Coming, then, to the question of which sentence is valid, we believe that it is the ten-year sentence imposed upon the first count.[55] The offense being, as the Government admits, a single one, petitioner was twice placed in jeopardy when the court, after accepting his plea of guilty to Count One and imposing sentence, ordered the second count read, and sentenced him to an additional term of fifteen years.[56] That additional fifteen-year sentence was thus void under the Fifth Amendment. *Ex parte Lange*, 18 Wall. 163; *Hans Neilsen, Petitioner*, 131 U. S. 176.

It cannot be objected that the amount of time which elapsed between the successive placings of petitioner in jeopardy is so small as to be immaterial, so that the pleas which are in fact successive may be taken as simultaneous. Issues of time may often have to be very nicely calculated in determining double jeopardy. Cf. *McCarthy* v. *Zerbst*,

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[54] Whether it would be proper to delay the petitioner's discharge until the sentence could be corrected (*Medley, Petitioner*, 134 U. S. 160, 174; *In re Bonner*, 151 U. S. 242, 261-262) does not bear on the *prematurity* of the application.

[55] The petition for certiorari makes the argument that both sentences are invalid. We respectfully submit that contention to the attention of the Court.

[56] The chronology is clear from the minutes of the arraignment, plea and motion (R. 8), and it is set out in some detail at R. 50-51.

85 F. (2d) 640 (C. C. A. 10th), certiorari denied 299 U. S. 610; *Clawans* v. *Rives*, 104 F. (2d) 240 (App. D. C.); *McFadden* v. *Commonwealth*, 23 Pa. 12; *State* v. *Savan*, 148 Ore. 423. There is no reason why the same precision should not be exercised here.

The decisions which hold that the two offenses merge, and that consequently only the greater offense is left for valid sentence, are quite distinguishable. In those cases the defendants stood trial, and the conviction on each count was necessarily simultaneous. *Durett* v. *United States*, 107 F. (2d) 438 (C. C. A. 5th); *Hewitt* v. *United States*, 110 F. (2d) 1 (C. C. A. 8th), certiorari denied 310 U. S. 641; see *Garrison* v. *Reeves*, 116 F. (2d) 978 (C. C. A. 8th). This is clearly pointed out in *Kokenes* v. *State*, 213 Ind. 476. We submit that here the only valid sentence is the ten-year sentence imposed in the first count.

It is thus essential to determine at this time under which sentence respondent is *now* holding petitioner. If the Court determines that the second or longer sentence alone is valid, petitioner is entitled to be discharged (even though such discharge may be delayed to correct the commitment). If, as we contend, the first sentence is valid, then we agree the petition is premature, but such decision will, of course, allow petitioner immediately to apply for parole.[57]

Conclusion.

We respectfully submit that the decision below should be reversed, with instructions to issue a writ of *habeas corpus* and accord petitioner a full and fair hearing, and in any event, that the Court should declare that with respect to the excessive sentences that petitioner's application for relief is premature only because the valid sentence is the ten-year sentence imposed on the first count.

Respectfully submitted,

CHARLES A. HORSKY,
Counsel for Petitioner.

[57] U. S. C., Title 18, Sec. 714.

APPENDIX.

The Fifth Amendment to the United States Constitution provides in part:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

R. S. Sec. 751 (U. S. C. Title 28 Sec. 451) provides:

"The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

R. S. Sec. 754 (U. S. C. Title 28 Sec. 454) provides:

"Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

R. S. Sec. 755 (U. S. C. Title 28 Sec. 455) provides:

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

R. S. Sec. 756 (U. S. C. Title 28 Sec. 456) provides:

"Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days."

R. S. Sec. 757 (U. S. C. Title 28 Sec. 457) provides:

"The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party."

R. S. Sec. 758 (U. S. C. Title 28 Sec. 458) provides:

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

R. S. Sec. 759 (U. S. C. Title 28 Sec. 459) provides:

"When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time."

R. S. Sec. 760 (U. S. C. Title 28 Sec. 460) provides:

"The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained."

R. S. Sec. 761 (U. S. C. Title 28 Sec. 461) provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

U. S. C. Title 28 Sec. 832 provides:

"Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General."

The Federal Rules of Civil Procedure provide:

"Rule 53. Masters.

"(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his

report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

"(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

"(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

"(d) Proceedings.

"(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their

attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

"(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

"(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

"(e) Report.

"(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

"(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

"(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

"(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions."

Rule 81(a)(2) provides:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

Judicial Code, section 262 (U. S. C. Title 28 Sec. 377) provides:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court,

the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

U. S. C. Title 12 Sec. 588b provided in October, 1936:

"(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both."